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Supreme Court of the United States

OCTOBER TERM, 1941

No. 707.

LEWIS J. VALENTINE, individually, and as Police Commissioner of the City of New York,
Petitioner,

against

F. J. CHRESTENSEN,
Respondent.

BRIEF OF NEW YORK CITY COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

NEW YORK CITY COMMITTEE OF THE
AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae

OSMOND K. FRAENKEL
Of Counsel

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The New York City Committee of the American Civil Liberties Union is interested in this case because it believes that it presents to this Court an important phase of the problem of the constitutional power of municipalities to restrict the distribution of leaflets. This problem, while an old one in this country, has received new attention in recent years in part because of the activities of the sect of Jehovah's Witnesses, in part because of increased labor activities. This case, however, presents neither of these types of activities but arises because of the desire of a single individual to show to the public, for a small fee, a submarine owned by him, and to distribute leaflets calling attention to it.

The ordinance which must here be considered is of the prohibitory type, such as was considered by this Court in three of the four cases generally known as *Schneider* v. *Irvington*, 308 U. S. 147. It presents no questions of licensing and regulation, such as was involved in *Lovell* v. *Griffin*, 303 U. S. 444, and the fourth of the group of cases which gave its title to the *Schneider* case. Nor does it involve any question of licensing and taxation, such as was involved in the case of *Jones* v. *Opelika*, recently dismissed by this Court for want of a final judgment.

Here the ordinance, Sanitary Code of the City of New York, §318, is almost identical in language with the various restrictive ordinances considered in the *Schneider* case, but for the fact that it is by its terms limited to "commercial and business advertising matter" (R. 4).

While respondent contends, and the majority of the Circuit Court agreed with him (R. 29-32), that the leaflet here in question may not properly be described as commercial, because of the fact that it was accompanied by a protest against certain actions of the police, we shall, for the purposes of this brief, assume that the leaflet must, as was held by Judge Frank in dissent (R. 34-35), be tested by standards applicable to leaflets which are commercial only. We adopt that position largely because we believe that it is impossible to make a philosophically sound distinction between commercial and non-commercial handbills. Thus, as the majority of the Circuit Court of Appeals pointed out, the Los Angeles handbill considered in the *Schneider* case had been considered by the State Court as commercial (R. 26). Yet this Court, while quoting that observation without comment (308 U. S. 155 n. 3), held the ordinance invalid as applied to that particular handbill. It is true that it has been suggested (see R. 29) that this handbill might have been denominated non-commercial on the theory that, although calling attention to a meeting at which admission was to be charged, it called attention to a meeting dealing with a non-commercial enterprise.

We do not believe that any distinction can validly be made on a ground so tenuous and difficult of application. If lines are to be drawn we submit that the basis of the distinction should be, not whether the matter distributed attracts attention to an article of commerce, but whether it is itself such an article or is a means of conveying information and opinion. For while the First Amendment is not designed to protect the sale of merchandise, we believe it covers all dissemination of "information or opinion" (as was said by Mr. Justice Roberts in the *Schneider* case). And information and opinion can relate to articles of commerce as well as to political or philosophical concepts.

It is significant that in the *Schneider* case Mr. Justice Roberts more than once repeated the phrase above quoted. He said:

> "Although a municipality may enact regulations in the interest of public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate *information or opinion.* - - -
>
> So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to *impart information* through speech or the distribution of literature, it may lawfully regulate the conduct of those using streets. - - -
>
> Prohibition of such conduct would not abridge the constitutional liberty, since such activity bears no necessary relationship to the freedom to speak, write, print or distribute *information or opinion.* - - - -
>
> As we have pointed out, the public convenience in respect of the cleanliness of the streets, does not justify an exertion of the police power which invades the free communication of *information and opinion* secured by the Constitution. * * * But, as we have said,

the streets are natural and proper places for the dissemination of *information and opinion*. - - -

While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those who, like the petitioner, desire to impart *information and opinion* to citizens at their homes."

Finally, he pointed out the invalidity of an ordinance which gave a municipality the right to say that

> "some persons may, while others may not, disseminate *information* from house to house" (italics ours).

It is significant that the only reference in the entire opinion to commercial matters was at the very end, in discussing the Irvington ordinance, when the Court said:

> "We are not to be taken as holding that commercial solicitation and canvassing may not be subjected to such regulation as the ordinance requires."

There it should be remembered, however, the ordinance was not a prohibitory one but a regulatory one. Moreover, it regulated not activities on the streets, but canvassing from house to house.

We believe that a fair reading of that opinion inevitably compels the conclusion that this Court, in voiding ordinances absolutely banning the use of leaflets on the public streets, did not intend to restrict its decision to leaflets calling attention to ideas and except from the operation of the decision leaflets calling attention to material things. The public interest is served in the latter as in the former case.

In the case at bar the leaflet sought to call to the public's attention a submarine which was on exhibition (R. 18a and b). For this plaintiff made a small charge (R. 18c). While it was undoubtedly the purpose of respondent in

exhibiting the submarine to make some money, the exhibit itself clearly had an educational and informative value for the public. If the distribution of a leaflet advertising this exhibit can be banned on the ground that it is commercial in character, then, with equal logic, a leaflet could be banned which announced the holding of a lecture on some literary or artistic subject at which an admission fee was to be charged. For in such case it would be reasonable to suppose that the management of the lecture expected to make some money out of it. Indeed the lecture platform has been an ancient method by which men well known in various fields have made large sums of money. We do not believe that the fact that lectures consist of spoken words, whereas the object of the leaflet here was to call attention to a material object, should make any difference whatever in the right of a municipality to forbid distribution of the leaflet.

We submit, moreover, that in the field of commerce, as in the field of ideas, it is important for the person of small means to be able to reach the public. Just as in the field of ideas there are many people who cannot command the ordinary media of expression, such as the newspaper, periodical or radio, either because of the unpopularity of their ideas or because of the expense involved, so there are many people who cannot use the ordinary methods of advertising to call attention to their products. Thus in a community in which a monopoly was seeking to entrench itself, it might be impossible for the independent producer or merchant to call attention to his wares by recourse to the local press, which often is controlled by the same monopoly. His only means of calling attention to his merchandise would be by the distribution of leaflets on the public streets. And in sections of a large city where there are no neighborhood newspapers the local merchant may also find it necessary to have recourse to leaflet distribution. The public gains by such activities because its attention is called to varying opportunities.

Of course, we do not mean to suggest that a municipality may in no event regulate leaflet distribution. Clearly it can prevent interference with traffic by persons who congregate at crowded places. It probably can regulate the use of any particular place on the streets as was done in *Commonwealth* v. *Pasconc*, 1941 Mass. Adv. 713, cert. denied 314 U. S. . Presumably also, the municipality can protect itself against street littering by punishing not only the person who actually throws the leaflet away, as was suggested in the *Schneider* case, but also by punishing the distributor if he presses his leaflets upon unwilling receivers. However, there is no such problem involved in the case at bar (see R. 5).

There remains to be considered the argument advanced by Judge Frank in dissent (R. 47) that the various billboard cases, such as *Fifth Avenue Coach Company* v. *New York City*, 221 N. Y. 467 and *Packer Corporation* v. *Utah*, 285 U. S. 105*, recognized the right of a state to forbid certain types of communication of information with regard to commercial products. However, those cases rested on entirely different considerations. The principal argument advanced in both of them was the equal protection clause. While counsel in each case made an argument based on the due process clause of the Fourteenth Amendment no contention was advanced that the advertisement there in question was a form of freedom of the press. Moreover, had such argument been advanced the special facts of those cases would have prevented the application of the principle here contended for.

In the *Fifth Avenue Coach* case, the decision rested in large part upon the fact that the municipality had the right to prohibit exterior advertising on buses and other vehicles because of the effect of such advertising upon traffic congestion. And the *Packer Corporation* case rested

*See also *Cusack Co.* v. *Chicago*, 242 U. S. 526; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269.

upon the effect of billboard advertisements of tobacco upon minors who were, by the state, denied the right to use tobacco. Moreover, it may well be that this Court would now accept the contention that a community can ban outdoor advertising merely because it offends the eye.* Such a restriction is not comparable with a complete prohibition of any use of the streets for the distribution of advertising leaflets.

It is, therefore, respectfully submitted that the judgment under review be affirmed.

Respectfully submitted,

NEW YORK CITY COMMITTEE OF THE
AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae

OSMOND K. FRAENKEL
Of Counsel

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*See *General Outdoor Adv. Co.* v. *Department of Public Works*, 289 Mass. 149, 184-87; Gardner, *The Massachusetts Billboard Decision*, 49 Harv. L. R. 869.

SUPREME COURT OF THE UNITED STATES.

707.—October Term, 1941.

Lewis J. Valentine, individually and as Police Commissioner of the City of New York, Petitioner, *vs.* F. J. Chrestensen.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 13, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondent, a citizen of Florida, owns a former United States Navy submarine which he exhibits for profit. In 1940 he brought it to New York City and moored it at a State pier in the East River. He prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee. On his attempting to distribute the bill in the city streets, he was advised by the petitioner, as Police Commissioner, that this activity would violate § 318 of the Sanitary Code which forbids distribution in the streets of commercial and business advertising matter,[1] but was told that he might freely distribute handbills solely devoted to "information or a public protest."

Respondent thereupon prepared and showed to the petitioner, in proof form, a double-faced handbill. On one side was a revision of the original, altered by the removal of the statement as to admission fee but consisting only of commercial advertising. On the other side was a protest against the action of the City Dock Department in refusing the respondent wharfage facilities at a city

[1] "*Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

pier for the exhibition of his submarine, but no commercial advertising. The Police Department advised that distribution of a bill containing only the protest would not violate § 318, and would not be restrained, but that distribution of the double-faced bill was prohibited. The respondent, nevertheless, proceeded with the printing of his proposed bill and started to distribute it. He was restrained by the police.

Respondent then brought this suit to enjoin the petitioner from interfering with the distribution. In his complaint he alleged diversity of citizenship; an amount in controversy in excess of $3,000; the acts and threats of the petitioner under the purported authority of § 318; asserted a consequent violation of § 1 of the Fourteenth Amendment of the Constitution; and prayed an injunction. The District Court granted an interlocutory injunction,[2] and after trial on a stipulation from which the facts appear as above recited, granted a permanent injunction. The Circuit Court of Appeals, by a divided court, affirmed.[3]

The question is whether the application of the ordinance to the respondent's activity was, in the circumstances, an unconstitutional abridgement of the freedom of the press and of speech.

1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets

[2] 34 F. Supp. 596.
[3] 122 F. 2d 511.

of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.

2. The respondent contends that, in truth, he was engaged in the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter. The court below appears to have taken this view since it adverts to the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit. We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

The decree is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.